[redacted]

Petitioners,

[redacted]

Respondent.

THE STATE OF NEW YORK, *et al.*,

Petitioners,

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

[redacted]

On Writs of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NOS. 89-1391 AND 89-1392

W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON*
Vice President for Public Policy
Knights of Columbus
1275 Pennsylvania Avenue, Suite 501
Washington, D.C. 20004
(202) 628-2356

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1391

DR. IRVING RUST, *et al.*,
Petitioners,

v.

LOUIS W. SULLIVAN, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Respondent.

No. 89-1392

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BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NOS. 89-1391 AND 89-1392

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Knights of Columbus, a fraternal organization of 1.5 million members, has a long history of pro-family advocacy. For example, *amicus* largely underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Amicus* is concerned about the effect that aggressive advertising of abortion, often under the guise of "counselling," has on vulnerable adolescents and on the values of society at large.

All parties have consented to the filing of this brief.

STATEMENT

Title X of the Public Health Services Act, 42 U.S.C. §§ 300 - 300a-8 (1982 & Supp. V 1987), authorizes the Secretary of Health and Human Services ("the Secretary") to make grants to public and nonprofit entities, to establish projects that "offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services and services for adolescents)." 42 U.S.C. § 300. Congress provided, however, that "[n]one of the funds appropriated under the subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6.

In 1988 the Secretary replaced the then-existing regulations implementing Title X.[1] The new regulations attach three major conditions to a grantee's receipt of federal funds under Title X. First, a "Title X project may not provide counselling concerning abortion as a method of family planning or provide referrals for abortion as a method of family planning." 42 C.F.R. § 59.8

[1] The original regulations, which were implemented prior to *Roe* v. *Wade*, 410 U.S. 113 (1973), required merely that grantees "not provide abortions as a method of family planning" in Title X programs, although they permitted "non-directive counselling" about abortion and referrals. *See* 42 C.F.R. § 59.5(9) (1972).

(a)(1). Title X projects likewise may not provide referrals for abortions, except in cases of medical emergency. 42 C.F.R. § 59.8(a)(2). Second, the regulations require a case-by-case determination of the "objective integrity and independence" of a Title X project, where the grantee who administers that project also provides abortion services. The regulations list a variety of factors that inform this determination, including the existence of separate accounting records, facilities, personnel, etc. *See* 42 C.F.R. § 59.9. Finally, the regulations prohibit abortion advocacy. The regulations cite as examples of such prohibited advocacy, lobbying and instituting legal actions to make abortion available as a method of family planning. 42 C.F.R. § 59.10(a).

Petitioners brought suit to enjoin these regulations as inconsistent with the right to abortion announced in *Roe* v. *Wade*, 410 U.S. 113 (1973), and with the Free Speech Clause of the First Amendment. Petitioners also claimed the regulations were not authorized by Title X. The district court upheld the regulations, rejecting all of petitioners' arguments. A divided panel of the court of appeals affirmed.

SUMMARY OF ARGUMENT

Both of petitioners' constitutional arguments depend on the validity of *Roe* v. *Wade*, 410 U.S. 113 (1973). Petitioners' Fifth Amendment argument does so explicitly. Petitioners' First Amendment argument, although it does not expressly invoke *Roe*, also depends on that decision for its force. Petitioners' claim that non-emergency abortion referrals are pure speech is necessarily contingent on *Roe*'s holding that abortion is a constitutional right. Otherwise, abortion could again be outlawed by the States, or prohibited by the federal government. And non-emergency referrals would be, at most, commercial speech, which could be prohibited altogether under *Posadas de Puerto Rico Assoc.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 320 (1986). The validity or in-

validity of *Roe* thus determines the First Amendment standard of review to be applied in this case, and should be considered as a threshold matter.

Nothing in the doctrine of *stare decisis* precludes reconsideration of *Roe*. Although the Court has never set forth in detail the applicability of the common law doctrine of *stare decisis* to its constitutional decisions, the Court's opinions overruling or declining to overrule prior cases are themselves precedents on that point. Those cases demonstrate that the Court has been willing to reconsider constitutional precedent whenever it possesses an articulable reason for believing the precedent to be erroneous. Such articulable reasons have included the case's inconsistency with prior and subsequent precedent or with other areas of the law, the impracticability of a case's legal framework, unusually intense academic criticism, or simply the firm belief that the case was wrongly decided. The Court has not been deterred by the fact that an erroneous case was either particularly recent or particularly old. It has not hesitated to overrule either close or unanimous decisions, and it has not apologized for overrulings that result from changes in the Court's membership. What *has* deterred the Court from overruling erroneous constitutional precedent is evidence that a precedent's rule has become so embedded in the law or so intertwined with statutory law that overruling it is effectively impossible.

Applying these precedents to *Roe*, it is clear that the case should be reconsidered and overruled. Far from being embedded in the law, *Roe* has never been fully accepted as definitive law at all. It has been supported by an ever-shrinking majority and plurality of this Court. The Executive Branch has repeatedly called upon the Court to overrule it. There have been attempts in Congress to circumvent or limit it. Several state legislatures have openly challenged it, and it continues to be the source of vigorous public protest. *Roe* has been bitterly criticized by a wide variety of academic commentators, many of whom are actually sympathetic to the notion of legalized abortion. *Roe*'s trimester framework is inherently unworkable. It is, furthermore, fundamentally at odds with large areas of the tort law, property law, and criminal law of the States. *Roe* is, in the last analysis, profoundly wrong. It should be reconsidered and overruled.

ARGUMENT

Petitioners mount two constitutional challenges to the regulations at issue here.[2] First, petitioners note (correctly, in *amicus*' view) that the regulations are inconsistent with *Roe* v. *Wade*, 410 U.S. 113 (1973); petitioners claim that the regulations therefore infringe the Due Process Clause of the Fifth Amendment. Brief for Petitioners in No. 1391 ("Br. Pet. I") at 31-37; Brief for Petitioners in No. 1392 ("Br. Pet. II") at 47-50. Petitioners' second and apparently preferred ground of attack is the Speech Clause of the First Amendment. Br. Pet. I at 13-30; Br. Pet. II at 32-46. Although petitioners never say so, their Speech Clause argument also necessarily depends to a great extent on the validity of *Roe*.

I. THE APPROPRIATE STANDARD OF REVIEW UNDER THE FIRST AMENDMENT DEPENDS UPON WHETHER *ROE* v. *WADE* IS GOOD LAW

But for *Roe*, the "referrals" at issue here would be, at best, proposals for a commercial medical transaction permitted only by legislative grace; at worst, they would be solicitations to commit a crime.[3] But for *Roe*, therefore, the referrals would be at most commercial speech, and

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[2] Petitioners also challenge the regulations as not authorized by Title X. *Amicus* will not address that issue.

[3] In 1973 most states prohibited all or most abortions. *See* Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157, 255-57 (1990) (listing states).

the regulations limiting them would be reviewed under the guidelines enunciated in *Central Hudson Gas & Elec. Corp.* v. *Public Servs. Comm'n of New York*, 447 U.S. 557, 566 (1980).

Under that standard, the regulations would certainly be constitutional. In *Posadas de Puerto Rico Assoc.* v. *Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), this Court upheld, against a First Amendment challenge, a Puerto Rico statute that outlawed casino advertising aimed at residents of Puerto Rico, but affirmatively permitted such advertising with respect to tourists. The Court noted that "the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. . . . [T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling. . . ." 478 U.S. at 345-46. The Court distinguished *Carey* v. *Population Servs. Int'l*, 431 U.S. 678 (1977), and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), which struck down restrictions on the advertising of contraceptives and abortion, respectively. The *Posadas* Court said that in those cases "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State." 478 U.S. at 345.[4]

But for *Roe*'s holding that abortion is a constitutional right, it could again be criminalized by the States, or it could be prohibited by Congress under its Commerce Power or by the Secretary exercising delegated legislative authority. Even if abortion were not criminalized, the federal government could, under *Posadas*, prohibit the referrals in question. There is, therefore, no

[4] *See also Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Counsel*, 425 U.S. 748, 760 (1976) (striking down statute forbidding advertising of prices of prescription drugs; noting that such advertisements "related to activity with which, at least in some respects, the State could not interfere").

question that, but for *Roe*, the regulations petitioners challenge would be constitutional. As *Posadas* noted, it would "surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." 478 U.S. at 346. It would be even stranger if Congress or the Secretary could prohibit abortion, but could not condition the receipt of federal funds on the recipient's willingness to forego making referrals for abortions except in cases of medical emergency.

In short, if *Roe* is not good law, the regulations at issue in this case implicate only commercial speech, and are clearly proper. *See Posadas*, 478 U.S. at 339-344; *cf. Bigelow*, 421 U.S. at 831 (Rehnquist, J., dissenting) ("the [abortion] advertisement appears to . . . be a classic commercial proposition"). If, on the other hand, *Roe* remains good law, the Court must decide whether the regulations at issue here improperly burden pure speech. *See Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983); *Perry* v. *Sindermann*, 408 U.S. 593 (1972). That is, admittedly, a closer question. Because the validity or invalidity of *Roe* thus determines the Court's standard of review in this case, it should be addressed as a threshold matter.[5]

[5] Petitioners urge the Court to avoid the constitutional questions in this case by holding that the regulations are not authorized by Title X. *See* Br. Pet. I at 37-39. That argument might have some force if the constitutional issues in question were ones that the Court ought to avoid under *N.L.R.B.* v. *Catholic Bishop*, 440 U.S. 490, 500-501 (1979). The validity of *Roe*, however, is a constitutional question the Court ought affirmatively to resolve. *See infra*, at 17-21.

II. THE DOCTRINE OF *STARE DECISIS* PRESENTS NO OBSTACLE TO A RECONSIDERATION OF *ROE*

A. The Question Whether to Depart from *Stare Decisis* and Reexamine Precedent Is Itself a Question of *Stare Decisis*

This Court has never definitively stated how the common law doctrine of *stare decisis* applies to the Court's constitutional decisions.[6] The Court has indicated generally that the barrier of *stare decisis* is not a particularly high one in constitutional cases: "[w]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decision." *Smith* v. *Allwright*, 321 U.S. 649, 665 (1944).[7]

[6] According to Justice Powell, the Court overrules an average of just over three cases per Term. Thus, "[d]uring [Chief Justice] Warren's tenure, the Court overruled sixty-three cases. The Burger Court . . . overruled some sixty-one cases." Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 284 (1990).

[7] The Court has indicated a greater reluctance to overrule its statutory constructions, on the theory that Congress can more readily remedy perceived errors in such cases than in constitutional ones. *See Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363 (1989) (reconsidering, but not overruling *Runyon* v. *McCrary*, 427 U.S. 160 (1976)); *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 695 (1978); *Edelman* v. *Jordan*, 415 U.S. 651, 671 & n.14 (1974). Nevertheless, the Court has not hesitated to overrule even statutory cases when circumstances warrant. For example, *Monell* overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), and held that municipalities may be liable for damages under § 1983. The *Monell* Court explained its decision to revisit the question as being justified by the fact that many of the Court's cases "both before and after *Monroe* are inconsistent with *Monroe*." 436 U.S. at 696.

On the other hand, the Court has also indicated that something more than undifferentiated doubt is necessary to cause the Court to reconsider its constitutional precedents. "[A]ny detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.'" *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)). Although the Court has never formulated precisely the nature of those "articulable reasons," "experience," or "newly ascertained" facts, the Court's actions and stated reasons in choosing when to overrule its prior cases are themselves precedents on the question. Those precedents demonstrate that, in practice, all that has been required of such "experience" or "facts" is that they present the "articulable reasons" for believing precedent to be wrong.[8]

[8] Individual Justices have suggested more elaborate approaches both in individual opinions and in law review articles. Justice Scalia wrote in *South Carolina* v. *Gathers*, 109 S. Ct. 2207, 2218 (1989), that "[w]ith some reservation concerning decisions that have become so embedded in our system of government that reform is no longer possible," *stare decisis* has little place in constitutional decisions. Justice Douglas likewise believed that "the place of *stare decisis* in constitutional law" was "tenuous," and stressed that "above all else . . . it is the Constitution which [a Justice swears] to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949). Justice Powell on the other hand has argued for a somewhat more vigorous version of the doctrine. Powell, *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 284 (1990). Yet he still permits exceptions. He posits, for example, that "a new Justice is less bound by precedent in construing a provision of the Constitution than a Justice who was sitting when a precedent was decided." *Id.* at 284.

Justice Stevens articulated a relatively strict standard in *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1 (1983); *see also Florida Dep't of Health and Rehab. Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Other Justices who have written on the subject include Justice Goldberg,

See Mitchell v. *W.T. Grant Co.*, 415 U.S. 600, 627-28 (1974) (Powell, J., concurring) ("It is . . . not only [the Court's] prerogative but also [its] duty to reexamine a precedent where its reasoning is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand.").

For example, in *United States v. Darby*, 312 U.S. 100 (1941), the Court overruled *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), and upheld the constitutionality of the Fair Labor Standards Act. In *Dagenhart*, the Court had ruled that Congress lacked power to regulate the production of "harmless" goods for commerce, and consequently struck down a child labor law. The *Darby* Court explained "that *Hammer* . . . was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled." 312 U.S. at 116-17.

The Court has often reconsidered its precedents, even *sua sponte*, when subsequent experience shows the framework they establish to be analytically flawed. For example, in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court overruled, by a 5-4 vote, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). That case had held that the Tenth Amendment prohibited Congress from intruding upon "traditional government functions" of the States. Neither of the parties in *Garcia* asked the Court to reconsider *National League of Cities*; they simply debated whether or not setting the pay scale of municipal transit employees was a "traditional government function." Nevertheless, while considering that

Equal Justice 4 (1971); Justice (then-Solicitor General) Reed, *Stare Decisis and Constitutional Law*, 35 Pa. B.A.Q. 131 (1938), and Justice Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944). *See also* Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401 (1988).

question, a majority of the Court apparently concluded that the entire *National League of Cities* framework was suspect. Consequently, the Court set the case for reargument, specifying as a new question presented whether *National League of Cities* should be overruled. 468 U.S. 1213 (1984) (mem.). Then, after rehearing, the Court voted 5-4 to overrule *National League of Cities*. Writing for the Court, Justice Blackmun explained that:

> Our examination of this "function" standard applied in . . . cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional government function" is not only unworkable but is also inconsistent with . . . [the] principles on which *National League of Cities* purported to rest.

Garcia, 469 U.S. at 531. *Garcia*, therefore, demonstrates the propriety of overruling relatively recent precedent, even when the Court has not been asked to do so, and even when only a bare majority of the Court considers the precedent unsound.[9]

Nor has the Court hesitated to abandon longstanding precedents, even at the cost of great resulting turmoil, when it comes to believe that their analytical frameworks lack foundation. Thus, in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Court overruled *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had held that federal courts, sitting in diversity cases, should apply federal "general" common law, but state "local" common law. There was nearly a century of judicial precedent elaborating and refining *Swift*'s distinction between "local" and "general" law. The Court could have decided *Erie* simply by further refining that standard and holding that

[9] According to Justice Dougles, from 1937 to March 28, 1949, the Court overruled thirty earlier decisions. "In twenty-one of these the reversals were on constitutional grounds. In the great majority of the thirty cases the cases overruled had been decided within the previous twenty years." Douglas, *supra* note 8, at 743.

certain state tort law was "local," not "general." Nevertheless, the Court completely overruled *Swift*. Justice Brandeis explained that:

> Experience in applying the doctrine of *Swift* v. *Tyson* had revealed its defects, political and social; . . . [T]he impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

Erie, 304 U.S. at 74.[10]

Likewise, when *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), overruled *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), it overturned a settled, though pernicious, social practice, the constitutionality of which had been repeatedly assumed by this Court—in *Plessy* itself, as well as in *Cumming* v. *Board of Educ.*, 175 U.S. 528 (1899); *Gong Lum* v. *Rice*, 275 U.S. 78 (1927); *Missouri Ex Rel. Gaines* v. *Canada*, 305 U.S. 337 (1938); *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950); *see also Berea College* v. *Kentucky*, 211 U.S. 45 (1908). Nevertheless, the *Brown* Court gave *Plessy* only short shrift, and justified its departure from *stare decisis* simply with the observation that *Plessy* was wrong. "Whatever may have been the extent of psychological knowledge at the time of *Plessy* . . . this finding is amply supported by modern authority." 347 U.S. at 494 (footnote omitted). *Plessy*'s applicability to public education had, moreover, previously been questioned. *Id.* at 690.

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[10] Although *Erie* turned in large part upon the proper construction to be placed on the Rules of Decision Act, the Court explained that it was more than simply a statutory case. "If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." *Erie*, 304 U.S. at 77-78.

The Court has sometimes elaborated on its reasons for doubting the validity of a precedent's analytical framework. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court partially overruled *Swain* v. *Alabama*, 380 U.S. 202 (1965), which had held that a defendant who claimed racial discrimination in his jury selection process must prove that the peremptory challenge system as a whole (and not just the jury selection in his individual case) was racially biased. As in *Erie* and *Garcia*, the *Batson* Court observed that the standard it had previously crafted had proven unworkable in practice. It "placed on defendants a crippling burden of proof" that resulted in "prosecutors' peremptory challenges [being] largely immune from constitutional scrutiny." 476 U.S. at 92-93.

The *Batson* Court, however, gave two additional reasons for believing *Swain* unsound. First, it noted that the "decision in *Swain* ha[d] been the subject of extensive commentary." *Id.* at 90 n.14. The Court cited seven law review articles that argued that *Swain* should be reconsidered, and a single article arguing that *Swain* should stand. *Ibid.* Second, the Court found that other developments in the law were in tension with *Swain*'s earlier rule. *See id.* at 93-95. It thus reconsidered *Swain* and partially overruled it.

It is equally instructive to note factors that have not been sufficient to prevent the overruling of precedent. The Court, for example, has apparently not been concerned with the closeness of its vote—either in the case to be reconsidered or in the case before it. Thus, the Court has not been deterred from overruling even unanimous decisions it has come to believe erroneous. In *Osborne* v. *Mobile*, 83 U.S. (16 Wall.) 479 (1872), for example, the Court unanimously permitted a state to impose a nondiscriminatory license tax on interstate businesses. Sixteen years later, however, the Court unanimously overruled that unanimous decision, and held that such license taxes were unconstitutional. *Leloup* v. *Port of Mobile*,

127 U.S. 640 (1888). *Leloup* explained simply that "[i]n view of the course of decisions which ha[d] been made since" *Osborne*, it was "very certain" that the ordinance upheld in this case was unconstitutional. It added that:

> a variety of cases involving the commercial power of Congress has been brought to the attention of the Court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the Court has been constrained to return to the fundamental principles stated . . . in former times, and to modify in some degree certain *dicta* and decisions that have occasionally been made in the intervening period.

127 U.S. at 647-48.[11]

The Court has also not hesitated to overturn recent 5-4 decisions with opposite 5-4 decisions. In *Jones* v. *Opelika*, 319 U.S. 103 (1943) (*"Jones II"*), and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), the Court reversed its own decision of the previous term in *Jones* v. *Opelika*, 316 U.S. 584 (1942) (*"Jones I"*), and struck down a license tax imposed on the dissemination of religious literature. The only difference between the two cases was that Justice Rutledge, who voted with the majority in *Murdock* and *Jones II*, had replaced Justice Byrnes, who had provided the fifth vote to the majority in *Jones I*. The *Murdock* Court did not apologize for that fact, however, and justified its decision solely with the observation that *Jones I* was wrong: "The judgment in *Jones* v. *Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high,

[11] Indeed, the overruling of unanimous opinions has not been as rare as one might suppose. According to Justice Douglas, "[d]uring the thirty-year period between 1860 and 1890, the Court on eighteen occasions overruled (expressly or in effect) controlling precedents . . . . In thirteen of the overruled cases the Court had been unanimous." Douglas, *supra* note 8, at 739.

constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature." 319 U.S. at 117.[12]

Similarly, in *Garcia*, *supra*, the Court overruled (5-4) *National League of Cities*, *supra*, which itself overruled (5-4) *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). (*National League of Cities* overruled *Wirtz* because it concluded that *Wirtz*'s analysis was "simply wrong." 426 U.S. at 854-55.)[13]

What has deterred the Court from overruling erroneous precedent is evidence that the precedent's rule has become so intertwined with statutory law that overruling it would essentially be impossible. Thus, in *Davis* v. *Department of Labor*, 317 U.S. 249 (1942), the Court limited, but did not overrule, *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205 (1917), which had created a questionable rule of admiralty jurisdiction.[14]

Concurring in *Davis*, Justice Frankfurter acknowledged that *Jensen* should be overruled, but declined to do so on the following grounds:

[12] *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), likewise overruled *Hepburn* v. *Griswold*, 75 U.S. (8 Wall.) 604 (1869), on the strength of President Grant's intervening appointments.

[13] *See also Board of Educ.* v. *Barnette*, 319 U.S. 624 (1943), *overruling Minersville School Dist.* v. *Gobitis*, 310 U.S. 586 (1940). The *Barnette* Court noted simply that "[t]his case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do." 319 U.S. at 630 (footnote omitted).

[14] *Jensen* had held that the Constitution's grant of admiralty and maritime jurisdiction to federal courts prevented a state from requiring compensation for a longshoreman injured on the gangplank of a docked ship. *Davis* then upheld an award under Washington law to the widow of a worker who drowned in a navigable river. It did so by creating a "twilight zone," in which employees could recover under either federal or state law. 317 U.S. at 256.

> [S]uch a desirable end cannot now be achieved merely by judicial repudiation of the *Jensen* doctrine. Too much has happened in the twenty-five years since that ill-starred decision. . . . Federal and State enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being. Therefore, until Congress sees fit to attempt another comprehensive solution of the problem, this Court can do no more than bring some order out of the remaining judicial chaos as marginal situations come before us.

317 U.S. at 259 (Frankfurter, J., concurring).

Davis thus provides an instructive counterpoint to *Erie* and *Brown*. Taken together, the three cases demonstrate that reconsideration of precedent is appropriate, even at the cost of great legal and social upheaval, provided that overruling the precedent so reconsidered would actually grant relief.

In sum, this Court's precedents indicate that reconsideration of a precedent is appropriate when the framework it establishes has proven unworkable (*Swain*, *Garcia*, *Erie*), when the case has been the subject of unusual academic criticism (*Batson*), when it is in tension with other aspects of the law (*Darby*, *Batson*), when the Court's subsequent cases call the precedent into question (*Brown*, *Leloup*), or when further reflection demonstrates that the decision, whether unanimous or narrowly decided, old or recent, is clearly wrong (*Darby*, *Murdock*, *Barnette*). The most frequently articulated constraint on reconsideration of a demonstrably erroneous precedent has been that the precedent has become so embedded in the law that reconsideration is effectively impossible. *Davis*, *supra*; *see Gathers*, 109 S. Ct. at 2218 (Scalia, J., dissenting); Stevens, *supra* note 7, at 6-9; Cooper, *supra* note 7, at 406.

B. This Court's Precedents Indicate That *Roe* Should Be Reconsidered

All of the foregoing reasons demonstrate that *Roe* should receive a full-dress reconsideration.

Far from being embedded in the law, *Roe* has never been fully accepted as settled law at all. It has been adhered to by an ever smaller majority and plurality of this Court. *See Roe* (7-2 majority); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (6-3 majority); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (5-4 majority); *Webster* v. *Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (four Justices voting to reaffirm, five justices split over whether reconsideration necessary). There have been repeated calls, in both the Executive and Legislative Branches, for *Roe*'s demise. *See, e.g.*, Briefs for the United States as *Amicus Curiae* in *Webster* v. *Reproductive Health Servs.*, No. 88-605; *Hodgson* v. *Minnesota*, No. 88-1125; *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495; Hearings on S.158 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess., Vol. 1 (1982). And there have been repeated attempts in the State legislatures to limit or circumvent *Roe*. Indeed, in the past year alone the legislatures of Pennsylvania, Idaho, Louisiana and the Territory of Guam have all voted to challenge *Roe* in whole or in part. *See* 1989 Pa. Laws 592, No. 64; Guam Pub. Law No. 20-134 (1990); *see also N.Y. Times*, July 28, 1990, § 1, p.1, col. 1; March 31, 1990, § 1, p.1, col. 1. Nor has *Roe* been accepted by the populace at large, as a wide variety of organized and unorganized protests demonstrates.

Ever since it was handed down, *Roe* has been the subject of withering academic criticism, even from many scholars sympathetic to legalized abortion. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*,

82 Yale L.J. 920, 947 (1973) (*Roe* "is bad constitutional law, or rather . . . it is not constitutional law at all and gives almost no sense of an obligation to try to be") (emphasis omitted); Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159, 184 ("*Roe* v. *Wade* is symptomatic of the analytical poverty possible in constitutional litigation"); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 301 (1973) (the *Roe* "Court could have put it better had it been candid enough to quote *Lochner*"). *See also* J.H. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-77; Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U. L. Q. 817, 819; A. Cox, *The Role of the Supreme Court in American Government* 113 (1976); A. Bickel, *The Morality of Consent* 27-29 (1975).

As was true with the legal structures built in *Swift* and *National League of Cities*, *Roe*'s trimester framework is inherently unworkable. *See Webster*, 109 S. Ct. at 3056 (plurality opinion) ("We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice' . . . . We think the *Roe* trimester framework falls into that category.") (citations omitted). *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting) ("The *Roe* framework . . . is clearly on a collision course with itself." As Justice White has noted, *Roe's* viability standard has almost nothing to do with attributes of personhood, or a particularized state of being, and everything to do with the "state of medical practice and technology" that allows an unborn child to survive at an ever earlier point in gestation. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting). Moreover, the quality of medical technology varies not only with time, but also with locale. Many unborn children

who are "viable" on any given day in a major metropolitan center would not be viable in a more rural setting. *Roe*'s framework can thus result in the same unborn child periodically gaining, losing, and regaining viability whenever his mother travels.[15]

Roe is, and always has been, inconsistent with vast areas of the statutory and common law of the States. As Dean Ely has observed, even "the bodies of doctrine to which the [*Roe*] court advert[ed] respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion." *Ely*, *supra*, at 925.

In the law of property, for example, an unborn child has always been considered a person in being for all purposes that are to his or her benefit, including taking by will or descent. *See* Epstein, *supra*, at 159, 174; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame Law. 349, 351-53 (1971) ("The property rights of the unborn child are as old as the common law itself."). *See also Thellusson* v. *Woodford*, 311 Eng. Rep. 117 (Ch. 1798). There, an 18th century English court, replying to the contention that a devise for the life of a child *en ventre sa mere* was void because the child was a non-entity, wrote:

> Let us see what this non-entity can do. He may be vouched in recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions . . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.

311 Eng. Rep. at 163.

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[15] Indeed, it is doubtful whether there is any such thing as a "viable" infant at all. Born or unborn, every infant is utterly dependent upon its parents and society. So are many other "non-viable" persons—the elderly and the handicapped, for example.

Equity often extends *parens patriae* protection to unborn children regardless of gestational age, compelling, for example, blood transfusions for pregnant women to protect their unborn children. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 844-48 (1973).

Roe was, of course, inconsistent with the criminal laws of most states in 1973. *See* Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157, 255-57 (1990) (listing states). It was also inconsistent with the view of abortion that prevailed at the time the Fourteenth Amendment was adopted (*see Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting) (listing abortion statutes in force at adoption of Fourteenth Amendment)), as well as with the roots of those statutes in early American and received English Common Law.[16] And *Roe* is still inconsistent with developing criminal law. *See, e.g., Minnesota* v. *Merrill*, 450 N.W.2d 318 (Minn.) (en banc), *cert. denied*, 110 S. Ct. 2633 (1990) (upholding homicide statute as

[16] *See Mills* v. *Commonwealth*, 13 Pa. 630, 633-34 (1850) ("The moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated . . . . There was therefore a crime at common law sufficiently set forth and charged in the indictment."); *State* v. *Slagle*, 83 N.C. 630, 632 (1880). *See also State* v. *Jones*, 2 Miss. (1 Walker) 39 (1820) (prosecuting slave owner for murder of slave; "the killing of a lunatic, an idiot, *or even a child unborn*, is murder, as much as the killing of a philosopher, and has not the slave as much reason as a lunatic, an idiot or *an unborn child*") (emphasis added).

These cases were based, ultimately, on the received English Common Law. *See, e.g.*, 1 W. Blackstone, *Commentaries* 129 ("Life is . . . a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."); E. Coke, *Third Institute* 50 (1644) (abortion of a woman "quick with child" is a "great misprision"); 1 M. Hale, *History of Pleas of the Crown* 433 (1736) (abortion, though not murder or manslaughter, is a "great crime"); 1 W. Hawkins, *A Treatise of the Pleas of the Crown*, ch. 31 § 16 (7th ed. 1795) (agreeing with Coke).

applied to killing of unborn child); *In the Matter of Stefanel Tyesha*, C. Nos. 39872, 39813 (Supr. Ct. N.Y., App. Div. 1st Dept. May 23, 1990) (child abuse proceeding based on alleged injury to child *in utero* resulting from mother's ingestion of illegal drugs). Nor are these types of cases an entirely recent phenomenon. *See* Kader, *The Law of Tortious Prenatal Death Since Roe* v. *Wade*, 45 Mo. L. Rev. 639 (1980).

In short, *Roe* fails every test this Court has applied in determining when an otherwise questionable precedent deserves protection under the doctrine of *stare decisis*.

III. UPON RECONSIDERATION, *ROE* SHOULD BE OVERRULED

Roe is, in the last analysis, profoundly wrong. It should be reconsidered for the reasons set forth above. Upon reconsideration, it should be overruled for all the reasons enunciated by the United States in its briefs in Nos. 88-605 and 88-805, as well as by *amicus* in its prior brief in No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed, and *Roe* v. *Wade* should be overruled.

Respectfully submitted,

W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON*
Vice President for Public Policy
Knights of Columbus
1275 Pennsylvania Avenue, Suite 501
Washington, D.C. 20004
(202) 628-2355

* Counsel of Record

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